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No. 00-415

Supreme Court, U.S.
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In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

versus

SWISHER INTERNATIONAL, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICI CURIAE TOTES-ISOTONER, CORPORATION ET. AL. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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27 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

STATEMENT 4

ARGUMENT 8

A. The Federal Circuit's Decision Does Not Conflict With this Court's Statements in *United States Shoe* 8

B. The Exercise of the CIT's 28 U.S.C. § 1581(i) "Residual" Jurisdiction in *United States Shoe* Does Not Bar The Exercise of 28 U.S.C. § 1581(a) "Protest" Jurisdiction in Cases Where a Protestable "Decision of the Customs Service" Has Been Issued 11

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

ASAHI METAL INDUS. CO. V. SUPERIOR COURT OF CALIFORNIA, 480 U.S. 102 (1987) 11

CALCIO V. UNITED STATES, 18 CT. INT'L TRADE 215 (1994)15

CEMEX, S.A. V. UNITED STATES, 133 F.3D 897 (FED. CIR. 1998) 17

COHENS V. VIRGINIA, 19 U.S. 264 (1821)..... 18

COLORADO RIVER WATER CONSERVATION DIST. V. UNITED STATES, 424 U.S. 800 (1976)..... 18

COMPANHIA BRASILEIRA CARBURETO DE CALCIO V. UNITED STATES, 18 CT. INT'L TRADE 215 (1994) 15

CONOCO, INC. V. FOREIGN TRADE ZONES BD ("CONOCO"), 18 F.3D 1581 (FED. CIR. 1994) 13

EURASIA IMPORT CO., V. UNITED STATES, 31 C.C.P.A. 202, (1944)..... 12

GSELL V. INSULAR COLLECTOR OF CUSTOMS, 239 U.S. 93 (1915)..... 11

HATTER V. UNITED STATES, 953 F.2D 626 (FED. CIR. 1992)17

HAWAIIAN INDEP. REFINERY CO. V. UNITED STATES, 460 F. SUPP. 1249 (CUST. CT. 1978)..... 15

J.W. HAMPTON, JR. & CO. V. UNITED STATES, 276 U.S. 394 (1928)..... 17

JUICE FARMS, INC. v. UNITED STATES, 68 F.3D 1344 (FED. CIR. 1995) 14

K MART CORP. v. CARTIER INC., 485 U.S. 176 (1988) 11

MAYOR OF PHILADELPHIA v. EDUCATIONAL EQUALITY LEAGUE, 415 U.S. 605 (1974)..... 11

MCCARTHY v. MADIGAN, 503 U.S. 140 (1992) 18

MCKESSON CORP. v. DIVISION OF ALCOHOLIC BEVERAGES & TOBACCO, 496 U.S. 18 (1990) 19

MILLER & CO. v. UNITED STATES, 824 F.2D 961 (FED. CIR. 1987), CERT. DENIED, 484 U.S. 1041 (1988)..... 12, 13, 16

MITSUBISHI ELEC. AM. INC. v. UNITED STATES, 44 F.3D 973 (FED. CIR. 1994)..... 15

NATIONAL CORN GROWERS ASS'N. v. BAKER, 840 F.2D 1547 (FED. CIR. 1988)..... 14

NATIONAL LICORICE CO. v. NLRB, 309 U.S. 350 (1940)... 11

NEC CORP. v. UNITED STATES, 151 F.3D 1361 (FED. CIR. 1998) 15

NORCAL/CROSETTI FOODS INC. v. UNITED STATES, 963 F.2D 356 (FED. CIR. 1992)..... 14

PAC FUNG FEATHER CO. v. UNITED STATES, 111 F.3D 114 (FED. CIR. 1997)..... 15, 16

ST. PAUL FIRE & MARINE INS. CO. v. UNITED STATES, 959 F.2D 960 (FED. CIR. 1992) 15

STONE CONTAINER CORP. V. UNITED STATES, 2000 U.S. APP. LEXIS 25466, NO. 99-1333 (FED. CIR. 2000) 19

TECHSNABEXPORT, LTD. V. UNITED STATES, 16 CT. INT'L TRADE 420 (1992) 17

UNITED STATES CANES SUGAR REFINERS' ASS'N. V. BLOCK, 544 F. SUPP. 883, 887 (CT. INT'L TRADE), AFF'D ON OTHER GROUNDS, 683 F.2D 339 (C.C.P.A. 1982) 15

UNITED STATES SHOE CORP. V. UNITED STATES, 19 CT. INT'L TRADE 288 (1995) 6

UNITED STATES SHOE, 19 CT. INT'L TRADE 1284 (1995); AFF'D, 114 F.3D 1564 (FED. CIR. 1997) 5, 12

UNITED STATES V. BOE (SERVCO CO., PARTY-IN-INTEREST), 64 C.C.P.A. 11 (1976) 18

UNITED STATES V. PRIORITY PRODS, INC., 793 F.2D 296 (FED. CIR. 1986) 17

UNITED STATES V. UNIROYAL, INC., 69 C.C.P.A. 179 F.2D 467 (C.C.P.A. 1982) 13, 14

UNITED STATES SHOE CORP. V. UNITED STATES, 19 CT. INT'L TRADE LEXIS 17 (1998) 7

UNITED STATES V. UNITED STATES SHOE CORP., 523 U.S. 360 (1998) ..... PASSIM

FEDERAL STATUTES

19 U.S.C. § 1514 ..... 6, 7, 9, 18

19 U.S.C. § 1514(a)(3) 2, 3, 12

19 U.S.C. § 1515(b) 7

19 U.S.C. § 1581 13

19 U.S.C. § 24.24(e)(5) 7

26 U.S.C. § 4461 1

26 U.S.C. § 4462(f)(1) 4, 9

28 U.S.C. § 1581 ..... 3, 11, 15

28 U.S.C. § 1581(a) ..... passim

28 U.S.C. § 1581(a)-(h) 14

28 U.S.C. § 1581(c) 15, 16

28 U.S.C. § 1581(h) 16

28 U.S.C. § 1581(i) ..... passim

28 U.S.C. § 2636(a) 19

28 U.S.C. § 2636(i) 5

28 U.S.C. § 2637 17

PUB. L. NO. 99-662, 100 STAT. 4082 (1986) 4

FEDERAL REGULATIONS AND RULES

19 C.F.R. § 24.24(e)(5) 2, 7, 8, 12

19 C.F.R. § 24.24(e)(5).4 1

19 C.F.R. § 24.25(e)(5) 1

Supreme Court Rule 23.1(c) 10

Supreme Court Rule 37.3(a) 1

SUPREME COURT RULE 37.6 1

OTHER AUTHORITIES

TREASURY DECISION 94-91 (28 CUST. B. & DEC. NO. 48 (1994)) 5, 6

S. REP. NO. 466, 96TH CONG., 1ST SESS. 7 (1980) 17

BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a), upon written consent of all parties, *amici curiae* Totes-Isotoner Corporation, *et al,*[1] respectfully submit this brief *amicus curiae* in support of Respondent, Swisher International, Inc., and submits that the petition for a writ of *certiorari* should be denied.

INTEREST OF *AMICI CURIAE*[2]

Amici curiae are exporters of waterborne commercial cargo who paid the Harbor Maintenance Tax ("HMT")[3] which this Court unanimously struck down as unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998)("*United States Shoe*"). Like Respondent Swisher International, Inc., *amici* have pursued refunds of the unconstitutionally-exacted tax by filing refund claims with the United States Customs Service ("Customs"), using the refund claims procedure which Customs established in its regulations, 19 C.F.R. § 24.24(e)(5).[4] Upon receiving

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[1] *Amici curiae* on whose behalf this brief is filed are: Totes-Isotoner, Corporation (as successor to Aris-Isotoner Inc.); Berwick Industries, Inc.; Chevron Chemical Company, Inc.; Chevron Chemical International Sales, Inc.; Chevron International Oil Company; Chevron Overseas Petroleum, Inc.; Chevron U.S.A. Inc.; Del Monte Foods, Inc.; Eastman Chemical Company; Fieldston Clothes, Inc.; Marconi Systems (f/k/a Gilbarco, Inc.); Michelin North America, Inc.; Microsoft Corporation; The Pillsbury Company; Rhodia, Inc. (f/k/a Rhone-Poulenc, Inc.); Rockwell International Corporation; Crompton Corporation (f/k/a Uniroyal Chemical Company Inc.); Xerox Corporation, Americas Operations Division; Xerox Corporation, Southern California Manufacturing Operations Division; and Xerox International Partners.

[2] Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with the Court under separate cover. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than the listed *amici* made a monetary contribution to the preparation or submission of this brief.

[3] 26 U.S.C. § 4461 *et seq.*

[4] 19 C.F.R. § 24.25(e)(5). Provides in pertinent part:

Customs decisions denying their HMT refund claims, *amici* filed protests with Customs pursuant to Section 514(a)(3) of the Tariff Act of 1930, *as amended,* challenging Customs' decisions.[5]

Amici agree with Respondent that the Federal Circuit correctly held: (1) that Customs' denials of 19 C.F.R. § 24.24(e)(5) refund claims are "decisions" relating to a "charge or exaction," and are protestable under 19 U.S.C. § 1514(a)(3); and (2) that, following denial of a timely-filed protest, exporters may file actions in the United States Court of International Trade ("CIT") pursuant to 28 U.S.C. § 1581(a), which gives that court "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under Section 515 of the Tariff Act of

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24.24. Harbor Maintenance Fee

***

(e) Collections.

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(5) Refund and supplemental payment. When a refund is requested or a supplemental payment is made, a Harbor Maintenance Fee Amended Quarterly Summary Report, Customs Form 350, should be mailed to the U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915, along with a copy of the Harbor Maintenance Fee Quarterly Summary Report, Customs Form 349, for the quarter(s) in which the refund is requested or a supplemental payment is made.

[5] 19 U.S.C. § 1514(a)(3) authorizes the filing of a protest to challenge "decisions of the Customs Service" relating to "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury."

1930."[6] The Federal Circuit's holding presents no significant legal issue, but merely acknowledges the scope of the CIT's longstanding "protest" jurisdiction. The petition for *certiorari* in this case raises no significant legal issue for review by this Court, and should be denied.

SUMMARY OF ARGUMENT

The Federal Circuit's decision below does not conflict with this Court's opinion in *United States Shoe*, but is perfectly consistent therewith. This Court's observation that the CIT properly exercised its 28 U.S.C. § 1581(i) jurisdiction in *United States Shoe*, in the absence of an "actual Customs decision," does not preclude the exercise of the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction in cases where, as here, a litigant has obtained a protestable "decision of the Customs Service" regarding a "charge or exaction," pursuant to 19 U.S.C. § 1514(a)(3).

It is well-settled that the basis for the CIT's jurisdiction over particular cases is based on the specific jurisdictional facts of each case. The CIT's decision to hear a constitutional challenge to a statute under provision of 28 U.S.C. § 1581 does not preclude the court from hearing similar challenges under a different part of that statute, for example where a litigant exhausts administrative protest remedies and invokes the CIT's Section 1581(a) "protest" jurisdiction.

Petitioner's claim that this case raises issues of sovereign immunity is also misplaced. Respondent has complied with the statute of limitations governing the waiver of sovereign immunity in this case. Thus, the petition

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[6] *Amici* participated in the briefing and argument of this case before the CIT, and in the briefing of the case before the Court of Appeals for the Federal Circuit. In addition, *amici* advanced their position regarding jurisdiction in briefing and argument before those same courts in *United States Shoe*, *supra*.

presents no significant issues of law for this Court.

STATEMENT

1. When the first lawsuits challenging the constitutionality of the export HMT were filed in 1994, exporters needed to determine the proper forum and procedure for such challenges. The Water Resources Development Act of 1986,[7] which imposed the HMT, did not specify a procedure for seeking refunds of the tax but only indicated that, for purposes of determining the jurisdiction of administrative agencies and courts, the tax should be treated "as if it were a customs duty." 26 U.S.C. § 4462(f)(1), (2). Most exporters filed challenges to the HMT in the United States Court of International Trade; some, however, brought suit in the Court of Federal Claims or in federal district court. In *United States Shoe*, this Court confirmed that the CIT "properly exercised jurisdiction" over cases challenging the constitutionality of the tax. 523 U.S. at 365.

While the CIT's exclusive jurisdiction over HMT challenges is now undisputed, Customs has consistently sought to limit the basis for that court's exercise of jurisdiction, in an effort to maximize the government's retention of the unconstitutionally-collected taxes.

Exporters have proceeded under two subsections of the CIT's jurisdictional statute. These are 28 U.S.C. § 1581(a), which, as noted above, gives the CIT exclusive jurisdiction over actions "to contest the denial of a protest," including protests against "charges and exactions"; and 28 U.S.C. § 1581(i), a "residual" provision which gives the CIT exclusive jurisdiction over actions arising out of any law providing for, *inter alia*, "revenues from imports or tonnage," "tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue," and "administration and enforcement" of matters arising

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[7] Pub. L. No. 99-662, 100 Stat. 4082 (1986).

under the Customs and trade laws. While both subsections confer jurisdiction on the CIT, they are subject to different statutes of limitations.[8]

2. While petitioner asserts that Section 1581(i) provides the *only* basis for the CIT to hear HMT challenges, it initially took the opposite position, arguing that exporters could only invoke the CIT's Section 1581(a) protest jurisdiction. This position was based on *Treasury Decision 94-91* (28 Cust. B. & Dec. No. 48 (1994)), in which the Customs Service asserted that the exporter's payment of the HMT, and Customs' acceptance of that payment, constituted a protestable "decision of the Customs Service" regarding the constitutionality of the tax, requiring exporters to file protests within 90 days thereafter. In *United States Shoe*, both the CIT and Federal Circuit held that mere payment/acceptance of the HMT was a passive act, rather than a "decision of the Customs Service," and ruled that the act of payment did not trigger a protest right. *United States Shoe*, 19 Ct. Int'l Trade 1284, 1297 (1995); *aff'd*, 114 F.3d 1564, 1569 (Fed. Cir. 1997).

3. Many exporters, believing that the mere payment of the HMT was a passive, statutorily-mandated act, rather than a protestable "decision," filed suits in the CIT, invoking that court's 28 U.S.C. § 1581(i) jurisdiction. By late 1994, hundreds of challenges to the constitutionality of the export HMT had been filed in that court. After consulting with counsel for exporters and the government, the Chief Judge of the CIT selected *United States Shoe* as a "test case" for determining both the constitutionality of the HMT and the basis for jurisdiction over challenges to the tax. *United States Shoe* was in part selected because the plaintiff had followed the procedure outlined by Customs in *Treasury*

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[8] Actions under Section 1581(a) must be commenced within 180 days after the mailing of notice of denial of a protest (28 U.S.C.§ 2636(a)(1)), while actions under Section 1581(i) must be commenced within two years after the plaintiff's cause of action accrues (28 U.S.C. § 2636(i)).

Decision 94-91 and had asserted the CIT's jurisdiction under *both* 28 U.S.C. §§ 1581(a) and (i). On February 15, 1995, the CIT published a "Scheduling Order" designating *United States Shoe* as a "test case," staying all other export HMT lawsuits, and directing the parties to file briefs on several issues, including "[w]hether the court has subject matter jurisdiction to hear and decide this type of case," and "[i]f so, does the court have that authority under 28 U.S.C. § 1581(a) or (i) or (a) and (i)?"[9]

As noted above, both the CIT and the Federal Circuit rejected Customs' assertion that mere payment of the HMT constituted a protestable Customs decision, and, on the facts of *United States Shoe*, held that the CIT had properly exercised jurisdiction in that case under 28 U.S.C. § 1581(i).

4. Although the government did not seek review of the lower courts' jurisdictional findings in *United States Shoe*, this Court's opinion did observe (at 365-366) that the CIT had properly exercised its 28 U.S.C. § 1581(i) jurisdiction in that case. Referring to the act of collecting the HMT, this Court noted that "protests are not pivotal, for Customs 'performs no active role,' it undertakes 'no analysis [or adjudication],' 'issues no directives,' 'imposes no liabilities'; instead, Customs 'merely passively collects' HMT payments. 114 F.3d at 1569." 523 U.S. at 365. At the same time, this Court took note of the CIT's 28 U.S.C. § 1581(a) protest jurisdiction, stating:

> Section 1581(a) surely concerns customs duties. It confers exclusive original jurisdiction on the CIT in "any civil action commenced to contest the denial of a protest." *A protest, as indicated in 19 U.S.C. Section 1514, is an essential prerequisite when one challenges an actual Customs decision.*

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[9] *United States Shoe Corp. v. United States*, 19 Ct. Int'l Trade 288 (1995).

523 U.S. at 365-66 (emphasis added). Since there had been no "actual Customs decision" regarding the HMT in *United States Shoe*, protest jurisdiction was not appropriate in that case.

5. In contrast to the plaintiff in *United States Shoe*, Respondent Swisher, *amici*, and other exporters pursued administrative remedies which *did* result in the issuance of a protestable "actual Customs decision" regarding the HMT. Swisher filed a refund claim with Customs pursuant to the specific procedure established in 19 C.F.R. § 24.24(e)(5), claiming that the HMT was an unconstitutional tax on exports, and demanding a refund. In response, Swisher received a "decision of the Customs Service," holding that the export HMT was not an unconstitutional tax on exports, but rather a permissible "user fee." Swisher protested this decision pursuant to 19 U.S.C. § 1514 and, upon denial of its protest pursuant to 19 U.S.C. § 1515(b), filed this suit invoking the CIT's 28 U.S.C. § 1581(a) protest jurisdiction.

Swisher was apparently the first plaintiff to receive a denied protest based upon a Customs decision rendered pursuant to 19 U.S.C. § 24.24(e)(5). It filed this action in the CIT in March, 1995 — after *United States Shoe* had been selected as the "test case" for determining the constitutionality of the export HMT. Thus, whether Customs' denial of a refund claim constituted a protestable "decision of the Customs Service" regarding the HMT was not before the courts in *United States Shoe*. Accordingly, following this Court's *United States Shoe* decision holding the export HMT to be unconstitutional, the CIT issued a new *Order*, designating Swisher's case as a "test case" regarding the extent of the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction over HMT challenges.[10]

The Federal Circuit acknowledged that the basis of

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[10] *See United States Shoe Corp. v. United States*, 19 Ct. Int'l Trade Lexis 17 (1998).

protest jurisdiction advanced by Respondent Swisher had not been presented in *United States Shoe* (*See Pet.*[11] at 9a-10a), and held that the export HMT is a "charge or exaction," so that Customs' denial of a 19 C.F.R. § 24.24(e)(5) refund claim is a protestable "decision of the Customs Service" regarding same. *See Pet.* at 16a-18a, which gives rise to a cause of action cognizable in the CIT under 28 U.S.C. § 1581(a). This decision did no more than acknowledge and apply the well-established and by now unremarkable principle that the precise statutory basis under which the CIT exercises jurisdiction depends upon the facts of the case.

ARGUMENT

REASONS FOR DENYING THE PETITION

A. The Federal Circuit's Decision Does Not Conflict With this Court's Statements in *United States Shoe*

1. Petitioner asserts (*Pet.* at 13) that the Federal Circuit's decision below "directly conflicts" with this Court's ruling in *United States Shoe*, in particular with this Court's observation that the CIT properly exercised its 28 U.S.C. § 1581(i) jurisdiction in that case. *See Pet.* at 17-19. However, as noted above, this Court's statements in *United States Shoe* only spoke to the issue of whether, *under the facts of that case*, a protestable "decision of the Customs Service" existed which could give rise to the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction. Indeed, this Court quoted that part of the Federal Circuit's decision in *United States Shoe* concerning "the government's argu[ment] that the relevant

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[11] *Petition for A Writ of Certiorari by United States of America* in *United States v. Swisher International*, No.00-415.

'decision' is Customs' acceptance of the exporter's payment,"[12] and cited with approval the Federal Circuit's holding that, because the passive act of collecting the tax involved no "decision" of the Customs Service, it did not satisfy the requirements for establishing 28 U.S.C. § 1581(a) jurisdiction *in that case*.

Contrary to petitioner's assertion, however, this Court's *United States Shoe* decision never addressed, much less foreclosed, the possibility that taxpayers such as Swisher might obtain protestable "decisions of the Customs Service" regarding the HMT, and challenge them under the CIT's 28 U.S.C. § 1581(a) protest jurisdiction. As noted above, the Water Resources Development Act requires that the HMT be treated as a "customs duty" for purposes, *inter alia*, of determining the jurisdiction of courts. 26 U.S.C. § 4462(f)(1), (2). This Court's *United States Shoe* decision specifically noted that "Section 1581(a) surely concerns customs duties," and "confers jurisdiction on the CIT to hear any civil action commenced to contest Customs' denial of a protest." This Court further reaffirmed that "*[a] protest, as indicated in 19 U.S.C. Section 1514, is an essential prerequisite when one challenges an actual Customs decision.*" 523 U.S. at 365-66. The Respondent here has simply trod a different path to judicial review of the export HMT than the plaintiff in *United States Shoe*; it has secured a protestable "decision" regarding an exaction of the HMT, protested it, and filed a 28 U.S.C. § 1581(a) suit to challenge the denial. This manner of proceeding is consistent with, and apparently anticipated by, this Court's *United States Shoe* decision.

2. In any event, far from constituting a "controlling precedent," as petitioner suggests (*Pet.* at 20), this Court's observations in *United States Shoe* were *dicta*. The government pointedly did not ask this Court in *United States*

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[12] 114 F.3d at 1568 (Fed. Cir. 1997).

Shoe to consider the lower courts' holdings that the CIT exercised jurisdiction over that case under 28 U.S.C. § 1581(i), and the parties' briefs to this Court did not address the question of jurisdiction at all.[13] In fact, the government's petition for *certiorari* in *United States Shoe* noted (at 7, n. 2) that the issue of jurisdiction was only relevant "for other claimants, who have challenged the Harbor Maintenance Tax *without first filing an administrative protest.*" (Emphasis added). The government's petition in *United States Shoe* also suggested that "[t]he jurisdictional issue is, moreover, peculiar to the refund requests of exporters under the Harbor Maintenance Tax and lacks recurring application in other contexts." *Id.* If, as the government asserts in *this* case, the selection of a particular basis of CIT jurisdiction forecloses all other possible ways of proceeding in that court, then this issue should have been presented to this Court in *United States Shoe*. The government's shifting positions on the question of CIT jurisdiction over exporters' HMT claims confirms that its *certiorari* petition in this case does not raise any significant jurisprudential issues, but is motivated solely by the government's displeasure with the Federal Circuit's decision and the possibility that exporters may thereby be able to secure additional refunds of the unconstitutionally-exacted taxes.

Petitioner's claim that *United States Shoe* is a "controlling precedent" on the issue of jurisdiction ignores Supreme Court Rule 23.1(c), which provides that only the questions set forth in the petition or fairly comprised therein

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[13] Indeed, the Court's comments regarding jurisdiction in *United States Shoe* appear to have been intended as a response to certain *amici curiae* who did not restrict their briefing to the Constitutional issue for which *certiorari* was granted, but who argued instead that the Court of Federal Claims ("CFC") had exclusive jurisdiction to hear actions involving the HMT. *See United States Shoe*, 523 U.S. at 366, n. 3 (acknowledging the CIT's exclusive jurisdiction, and noting that challenges filed in the CFC could be transferred to that court).

will be considered by the Court. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 624 (1974); *National Licorice Co. v. NLRB*, 309 U.S. 350, 357 (1940). Where this Court grants *certiorari* to review a jurisdictional issue, it solicits briefing from the parties on the issue, and makes an express decision regarding whether the lower court's holding on jurisdiction shall be affirmed or reversed. *See, e.g., Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987); *Gsell v. Insular Collector of Customs*, 239 U.S. 93 (1915); *K Mart Corp. v. Cartier Inc.*, 485 U.S. 176 (1988). No such holding was issued in *United States Shoe*; while this Court noted that the CIT had exclusive jurisdiction over HMT challenges, it never held, or even suggested, that the CIT's power to hear such challenges was cabined within a single subsection of that court's jurisdictional statute, 28 U.S.C. § 1581. Rather, this Court noted that 28 U.S.C. § 1581(i) jurisdiction was proper under the facts of *United States Shoe*, and acknowledged that protest procedures would be proper, as in this case, where a "decision" of the Customs Service is involved. The ruling of the Federal Circuit in this case is consistent with that view.

B. The Exercise of the CIT's 28 U.S.C. § 1581(i) "Residual" Jurisdiction in *United States Shoe* Does Not Bar The Exercise of 28 U.S.C. § 1581(a) "Protest" Jurisdiction in Cases Where a Protestable "Decision of the Customs Service" Has Been Issued

Petitioner asserts that the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction is "not an available route for challenging the constitutionality of the [Harbor Maintenance] tax on exports." *Pet.* at 15. Nowhere does petitioner challenge the Federal Circuit's ruling that the export HMT is a "charge or exaction of whatever character within the jurisdiction of the Secretary of the Treasury," and thus

subject to protest pursuant to 19 U.S.C. § 1514(a)(3). Nor does petitioner deny that Customs' October 26, 1994 letter to Swisher, denying the company's 19 C.F.R. § 24.24(e)(5) HMT refund claim, was a "decision of the Customs Service" regarding such "charge or exaction."[14] Instead, petitioner claims that because the CIT was found to have properly exercised its 28 U.S.C. § 1581(i) jurisdiction on the facts of *United States Shoe*, *supra*, all other avenues for exporters to seek judicial review of the HMT in that court are thereby foreclosed. Petitioner's "foreclosure theory," however, rests on a fundamental misstatement of the jurisprudence regarding the CIT's 28 U.S.C. § 1581(i) jurisdiction. While the courts have held that the CIT's 28 U.S.C. § 1581(i) jurisdiction should generally not be invoked unless other avenues for jurisdiction are unavailable or "manifestly inadequate," the selection of the appropriate jurisdictional vehicle has depended upon the facts of each case, and the sound discretion of the CIT. That the CIT hears particular issues pursuant to its Section 1581(i) jurisdiction in one case (as in *United States Shoe*) has never been deemed to foreclose other plaintiffs from seeking review of the same or similar issues using different procedures. Indeed, petitioner's "foreclosure theory" is without precedential support, and is plainly contrary to the statutes governing the CIT's jurisdiction.

1. In *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988), the Federal Circuit summarized its jurisprudence regarding the CIT's 28 U.S.C. § 1581(i) jurisdiction, observing that it should not be invoked when "jurisdiction under another subsection of Section 1581 is or could have been available, *unless* the remedy provided under that other subsection

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[14] That Customs' refusal to refund a charge or exaction is a protestable "decision" has been settled law since *Eurasia Import Co., v. United States*, 31 C.C.P.A. 202, 211-12 (1944).

a litigant invoking the CIT's Section 1581(i) jurisdiction bears the burden of showing that other avenues of jurisdiction are unavailable or inadequate. The Federal Circuit commented upon the burden which *Miller* places on Section 1581(i) litigants in *Conoco, Inc. v. Foreign Trade Zones Bd* (*"Conoco"*), 18 F.3d 1581, 1584 n. 8 (Fed. Cir. 1994):

> This threshold requirement does not appear in the statute, but finds expression in certain of our precedents. *See, e.g., Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041, 98 L. Ed. 2d 859, 108 S. Ct. 773 (1988). It may have a basis in the prefatory "in addition to" language of subsection (i). *See United States v. Uniroyal, Inc.*, 69 C.C.P.A. 179, 687 F.2d 467, 475 (C.C.P.A. 1982)(Nies, J., concurring). It presumably serves the purpose of carrying out Congress' intent that subsection (i) be a "residual" grant of jurisdiction, and not be used to routinely bypass the "traditional method" of obtaining judicial review of international trade disputes involving Customs — filing a protest and then seeking judicial review if Customs denies the protest. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3279, 3758.

The "*Miller* rule" therefore acknowledges that the CIT's 28 U.S.C. § 1581(i) jurisdiction is "in addition to" that court's other jurisdiction grants, and that its use is appropriate where

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Miller which clearly delineates that unless another subsection under 19 U.S.C. § 1581 would be "manifestly inadequate," section 1581(i) may not be invoked. *Pet.* at 12.

other jurisdiction grants, and that its use is appropriate where the remedies afforded under 28 U.S.C. § 1581(a)-(h) are either unavailable or inadequate. *Miller* also confirms that the filing of a protest against a Customs decision — the precise pathway followed here — is the "traditional" method for seeking judicial review of Customs' decisions.

Courts have invoked the "*Miller* rule" to decline to hear cases under Section 1581(i) where litigants failed to avail themselves of other available avenues of jurisdiction, such as 28 U.S.C. §1581(a) "protest" jurisdiction,[16] Section 1581(b) "domestic interested party petition" jurisdiction,[17] or Section 1581(c) jurisdiction to review Commerce Department antidumping or countervailing duty assessments,[18] without showing why such remedies were inadequate under the circumstances.

2. However, the CIT has frequently exercised its Section 1581(i) "residual" jurisdiction to hear cases which could have been raised by protest and brought to court under 28 U.S.C. § 1581(a), or addressed under other bases of the CIT's jurisdiction. For example, in *Conoco, supra*, the Federal Circuit held that an importer challenging a Foreign Trade Zones Board decision imposing duties on certain

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[16] *See, e.g., United States v. Uniroyal, Inc.*, 687 F.2d 467, 475 (C.C.P.A. 1982)(Section 1581(i) challenge to exclusion of merchandise not allowed when protest remedy was available, and no irreparable harm would result from its use); *Juice Farms, Inc. v. United States*, 68 F.3d 1344 (Fed. Cir. 1995)(CIT properly declined to exercise Section 1581(i) jurisdiction where importer failed to file timely protest reviewable under Section 1581(a)).

[17] *National Corn Growers Ass'n. v. Baker*, 840 F.2d 1547 (Fed. Cir. 1988)(Section 1581(i) jurisdiction held improper in action by domestic party challenging Customs decision, where effect of allowing such jurisdiction would be evasion of 19 U.S.C.§ 1516 "domestic interested party" procedures); *Norcal/Crosetti Foods Inc. v. United States*, 963 F.2d 356 (Fed. Cir. 1992)(same).

[18] *See, e.g., Miller & Co., supra* (importer may not invoke Section 1581(i) to challenge countervailing duty assessment after failing to participate in Commerce Department administrative proceedings reviewable under 28 U.S.C. § 1581(c)).

merchandise should be permitted to proceed under Section 1581(i), rather than being required to complete an import transaction, pay and protest duty assessments, and invoke the CIT's protest jurisdiction. The Federal Circuit reasoned that a protest would have been futile. Years earlier, virtually the same issue had been addressed in a case brought under the "protest" jurisdiction of the Customs Court, the CIT's predecessor. *See Hawaiian Indep. Refinery Co. v. United States*, 460 F. Supp. 1249 (Cust. Ct. 1978).

Where Section 1581(a) protest jurisdiction is available, but the outcome of the protest is predetermined, the courts have readily approved the CIT's exercise of jurisdiction under 28 U.S.C.§ 1581(i). *See, e.g., United States Canes Sugar Refiners' Ass'n. v. Block*, 544 F. Supp. 883, 887 (Ct. Int'l Trade), *aff'd on other grounds*, 683 F.2d 339 (C.C.P.A. 1982)(challenge to Presidentially-imposed quotas on sugar imports); *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960 (Fed. Cir. 1992)(surety challenge to duty demand). Similarly, where determinations could have been reviewed under the CIT's 28 U.S.C. § 1581(c) jurisdiction over Commerce Department antidumping and countervailing duty decisions, but such review is inadequate under the circumstances, the CIT's power to hear the case under its Section 1581(i) "residual" jurisdiction is well-recognized. *See, e.g., NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998)(challenge to initiation of antidumping investigation). Invoking Section 1581(i) is also appropriate where other bases of jurisdiction are unavailable. *Mitsubishi Elec. Am. Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994).

The choice of the proper jurisdictional basis depends upon the facts of each case: "if remedies ultimately available under 28 U.S.C. § 1581 are rendered useless *by particular factual circumstances*, such remedies may be manifestly inadequate or ineffective." *Companhia Brasileira Carbureto de Calcio v. United States*, 18 Ct. Int'l Trade 215 (1994). *See also Pac Fung Feather Co. v. United States*, 111 F.3d 114, 116 (Fed. Cir. 1997)(litigant seeking judicial review of

regulations under Section 1581(i) not required to apply for ruling and seek pre-importation declaratory relief under 28 U.S.C. § 1581(h), where nature of ruling would be a foregone conclusion).

Thus, the basis for exercise of the CIT's jurisdiction has always been fact-dependent. For example, Administrative Procedure Act challenges to Customs regulations have been entertained under the CIT's 28 U.S.C. § 1581(a) "protest" jurisdiction,[19] its Section 1581(h) "declaratory judgment" jurisdiction,[20] and its Section 1581(i) "residual" jurisdiction.[21] Each of the referenced subsections has different prerequisites for the institution of a suit, directly refuting petitioner's suggestion that there can only be one pathway to CIT jurisdiction for a given type of challenge.

Moreover, no judicial decision, legislative history or other authority has ever announced or supported the unique "foreclosure theory" advanced in the Petition. It is true, as noted above, that a litigant seeking to invoke Section 1581(i) must show that other avenues for CIT jurisdiction are unavailable or inadequate in its case. However, the suggestion that once the CIT exercises Section 1581(i) jurisdiction in a given case, all other litigants are foreclosed from pursuing other bases of jurisdiction is without any foundation. That the plaintiff in *United States Shoe* was allowed to proceed without first protesting an "actual Customs decision" by no means debars litigants such as Swisher, who secured such decisions and followed the more

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[19] *See, e.g., Miller & Co., supra* (importer may not invoke Section 1581(i) to challenge countervailing duty assessment after failing to participate in Commerce Department administrative proceedings reviewable under 28 U.S.C. § 1581(c)).

[20] *See, e.g., Miller & Co., supra* (importer may not invoke Section 1581(i) to challenge countervailing duty assessment after failing to participate in Commerce Department administrative proceedings reviewable under 28 U.S.C. § 1581(c)).

[21] *See Pac Fung Feather Co. v. United States*, 111 F.3d 114 (Fed. Cir. 1997).

"traditional" route for invoking CIT jurisdiction.

The notion that litigants having a common grievance may approach a court of competent jurisdiction under separate procedural vehicles hardly presents a significant legal issue. *See, e.g., Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992). In *Techsnabexport, Ltd. v. United States*, 16 Ct. Int'l Trade 420, 423-426 (1992), the CIT held that its authority to accept jurisdiction over a case is not circumscribed by its choice of a different jurisdictional vehicle to hear other cases raising similar issues.

3. That the Petition fails to raise a credible legal issue is further demonstrated by 28 U.S.C. § 2637, which provides that the CIT "shall, *where appropriate*, require the exhaustion of administrative remedies." (Emphasis added). This statute grants the CIT the equitable, discretionary power to require or waive the exhaustion of administrative remedies as a condition to invoking the court's jurisdiction. The exercise of this power is reviewable by appellate courts only for abuse of discretion. *Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998); *United States v. Priority Prods, Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986). That the CIT is empowered to decide legal issues framed by an administrative protest (as in *Swisher*), or without a protest (as in *United States Shoe*), does not involve a significant legal issue, but merely a fact-specific exercise of the CIT's discretion.

Indeed, prior to the enactment of the *Customs Courts Act of 1980*, a protest was the exclusive means for challenging a Customs decision, even where constitutional issues were raised. *See, e.g., J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). In passing the 1980 Act, Congress indicated that the CIT's Section 1581(a) protest jurisdiction "merely restates existing law as to the jurisdiction of the Customs Court," S. Rep. No. 466, 96th Cong., 1st Sess. 7 (1980), and thereby continues to embrace constitutional questions.

4. The *"Miller* rule" on which petitioner relies holds

that a party seeking to invoke the CIT's Section 1581(i) "residual" jurisdiction bears the burden of demonstrating that jurisdiction under 28 U.S.C. § 1581(a) – (h) is either unavailable or manifestly inadequate. However, this burden is not properly thrust upon Respondent Swisher, which asserted jurisdiction under 28 U.S.C.§ 1581(a). Whether the CIT has jurisdiction over an action pursuant to 28 U.S.C. § 1581(a) is not a discretionary matter. *See United States v. Boe (Servco Co., Party-in-Interest)*, 64 C.C.P.A. 11, 16 (1976). Where, as here, jurisdiction is asserted under 28 U.S.C. § 1581(a), the only jurisdictional questions for the courts to decide are: (1) whether the plaintiff has received a "decision of the Customs Service" regarding one of the matters enumerated in 19 U.S.C. § 1514; and (2) whether such decision was timely protested. As this Court has stated, "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them," and "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *McCarthy v. Madigan,* 503 U.S. 140, 146 (1992), *citing Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-818 (1976) and *Cohens v. Virginia*, 19 U.S. (6 Wheaton) 264 (1821).

In holding that the CIT could exercise its Section 1581(a) "protest" jurisdiction in this case, the dispositive determination by the Federal Circuit was that the export HMT was a "charge or exaction of whatever character within the jurisdiction of the Secretary of the Treasury." The petition does not challenge or seek review of this outcome-determinative holding, nor does it contest the timeliness of Swisher's protest. Indeed, petitioner avoids this issue to the point of disingenuousness, asserting (*Pet.* at 19) that decisions regarding the HMT do not fall within certain categories of protestable decisions, while failing to even mention the "charges and exactions" provision in Section 1514(a)(3) on which the Federal Circuit's decision rests.

5. Petitioner's claim of sovereign immunity (*Pet.* at

20-21) raises no issue deserving of review by this Court. While it is true that statutes of limitations may be enforced against claims for refund of an unconstitutional tax, *see McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 25 (1990), the statute of limitations for actions involving Customs' denial of protests is clear, and begins to run only after the protest is denied. *See* 28 U.S.C. § 2636(a). Nor does the use of the protest remedy allow for evasion of any statute of limitations. Exporters who received HMT refunds pursuant to 28 U.S.C. § 1581(i), as in *United States Shoe*, are free to claim refunds of tax payments not covered by those actions, and to protest any Customs denials respecting such refunds. In subsequent actions brought pursuant to the CIT's 28 U.S.C. § 1581(a) protest jurisdiction, the government would be free to pursue any defenses of laches, waiver, or election of remedies which it might have with respect to those claims as, indeed, the government could have raised in the instant case. *See Stone Container Corp. v. United States*, 2000 U.S. App. Lexis 25466, No. 99-1333 (Fed. Cir. 2000).

CONCLUSION

The petition for a writ of *certiorari* presents no significant issue regarding the jurisdiction of the United States Court of International Trade to hear cases seeking refunds of the export HMT, and alleges no material error in the decision of the court below. The petition should be denied.

Respectfully submitted,

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